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No. 82-1371

In the Supreme Court of the United States

OCTOBER TERM, 1983

MARGARET M. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, PETITIONER

v.

LEON S. DAY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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Respondents' position suffers from two fatal flaws. First, respondents provide no answer to the argument that the 90-day time limits imposed by the district court are flatly inconsistent with the deliberate judgment by Congress and the Secretary *not* to impose fixed deadlines on the processing of disability claims because of their concern that such deadlines would adversely affect the quality of adjudication. Second, respondents ignore the fact that the Social Security disability program is nationwide in scope and was intended by Congress to be administered on a uniform basis throughout the country. Their attempt to justify the time limits and interim benefits imposed by the courts below on the ground that they depend upon fact-bound determinations and affect only the State of Vermont therefore must be rejected.

Affirmance of the judgment below, when combined with similar judicial decrees that have been entered elsewhere and others that surely would follow, would lead to a further disruption and balkanization of the nationwide disability program and to the further accretion of deadlines that almost certainly could not be met if applied to the ever expanding caseload, at least not without substantial cost to the fairness and accuracy of the decision-

making process. Data recently compiled by HHS for the fiscal year ending September 30, 1983 show that the number of requests for ALJ hearings under the Social Security Act increased by more than 40,000 over the number for the previous year, to a record total of 362,223—a five-fold increase over the 72,202 hearing requests just a decade earlier.[1]

The Social Security program thus far has successfully absorbed the extraordinary increase in hearing requests through the combination of additional resources furnished by Congress and improved administration by the Secretary, with the result that the average time required for a claimant to receive an ALJ decision has not been substantially extended by the huge caseload.[2] This greatly enhanced productivity is reflected in data showing that at the end of fiscal year 1983, the average number of cases decided by each ALJ each month stood at 45 (or an average of two cases each working day), a dramatic increase over the average of 34 cases decided per month at the end of fiscal year 1982 and 14 per month in fiscal year 1973.[3] But the productivity of the ALJs, who

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[1] Office of Hearings and Appeals, U.S. Dep't of Health and Human Services, *Key Workload Indicators, September 1983*, at 1 (Oct. 26, 1983). We have lodged a copy of the September 1983 edition of the monthly *Key Workload Indicators* with the Clerk of this Court.

[2] The average waiting period for an ALJ decision was 174 days in fiscal year 1973 and 183 days at the end of fiscal year 1983. See *Key Workload Indicators, September 1983, supra* note 1, at 1. As the House Ways and Means Committee observed in 1982 when it recommended against enactment of fixed deadlines for the processing of claims, these periods compare favorably to the average time taken by federal district courts to dispose of Social Security cases under 42 U.S.C. (Supp. V) 405(g). See H.R. Rep. 97-588, 97th Cong., 2d Sess. 19-20 (1982) (quoted in Gov't Br. 29-30). During the 12 months ending June 30, 1982, the average time for a decision by the district courts was 11 months, and 10% of the cases required more than 26 months for disposition. *Annual Report of the Director of the Administrative Office of United States Courts* 252 (1982). This is so even though the district courts, unlike ALJs, do not conduct de novo hearings on the claims.

[3] *Key Workload Indicators, September 1983, supra* note 1, at 1.

have an average of 228 cases on their dockets,[4] obviously cannot be increased much further in order to eliminate the nationwide backlog of pending cases and meet judicially imposed deadlines without also sacrificing the quality of decisions.

What constitutes a "reasonable * * * opportunity for a hearing" within the meaning of 42 U.S.C. (Supp. V) 405(b) must be determined not in the abstract, as respondents suggest, but by reference to the terms and manner of implementation of the Social Security Act itself, of which 42 U.S.C. (Supp. V) 405(b) is a part. Respondents, like all the courts that have considered the question (Gov't Br. 37-38), do not challenge the Secretary's good faith in attempting to dispose of the backlog of pending cases or the validity of the procedures adopted by her and by Congress to adjudicate claims. Moreover, Congress has been fully aware over the last decade of the timing of ALJ hearings and, pursuant to authorization in the Social Security Act itself, has allocated resources to support the adjudication process at a particular level each year. Processing times that are such an entrenched feature—and direct and foreseeable consequence—of the conscientious implementation of the Social Security Act by Congress and the Secretary cannot be held to violate that very Act. Accordingly, we submit that the Secretary fully satisfies her obligation under 42 U.S.C. (Supp. V) 405(b) to afford claimants "reasonable * * * opportunity for a hearing" by diligently processing more than 360,000 hearing requests annually in accordance with those established procedures and priorities and within the limits of available resources.

1.a. Respondents make virtually no effort to answer the showing in our opening brief (Gov't Br. 19-31) that Congress, with full awareness of the size of the pending caseload and the time required to obtain an ALJ decision, repeatedly has eschewed fixed deadlines for the processing of disability claims because of its recognition that disability determinations are often time-consuming

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[4] *Key Workload Indicators, September 1983, supra* note 1, at 1.

and its belief that fixed deadlines could adversely affect the quality of adjudications. For example, respondents' only reply to our reliance (Gov't Br. 21-22) on the fact that Congress expressly excluded disability cases from the requirement in 42 U.S.C. 1383(c)(2) that an ALJ render his decision within 90 days of the hearing request is that the Section is irrelevant because it applies to claims for SSI benefits under Title XVI, not claims for disability benefits under Title II, which are involved in this case. See Resp. Br. 37-38. This response misses the point. Congress imposed a 90-day deadline for ALJ decisions in SSI cases because eligibility for SSI benefits is based on need and expeditious treatment therefore was thought to be appropriate; yet even in that context Congress excluded disability cases from the deadline (Gov't Br. 21-22). A fortiori, under Title II, where eligibility is *not* based on need, the general language in 42 U.S.C. (Supp. V) 405(b) referring to a "reasonable * * * opportunity for a hearing" cannot be read to support judicial imposition of fixed deadlines in disability cases.

b. Respondents also do not dispute our submission (Gov't Br. 22, 48) that the exclusion of disability cases from the provision in 42 U.S.C. 405(q) for expedited payment of benefits under Title II reflects a congressional judgment not to force a hasty decision in Title II disability cases through imposition of arbitrary deadlines. Instead, respondents attempt to avoid the obvious import of 42 U.S.C. 405(q) for their own Title II claims by citing (Resp. Br. 38-39) a different Section of the Act, 42 U.S.C. 1383(a)(4)(B), which provides for accelerated payments not under Title II, but under the SSI program. Section 1383(a)(4)(B) permits the Secretary to pay benefits for up to three months to persons who have applied for SSI benefits on the basis of disability or blindness, pending a decision on their applications. This Section, respondents contend, reflects a congressional intent to expedite the decision in disability cases generally. In fact, however, it reflects the opposite intent. The legislative history of 42 U.S.C. 1383(a)(4)(B) makes clear

that it was enacted "in recognition of the fact that in some cases *additional* time is needed to obtain and evaluate medical and other evidence to establish disability" and of the need for a mechanism to cover an SSI applicant's living expenses during that time. S. Rep. 92-1230, 92d Cong., 2d Sess. 391 (1972) (emphasis added).[5]

Moreover, the payment may be made to SSI claimants under 42 U.S.C. 1383(a)(4)(B) only if the applicant is "presumptively disabled or blind and is determined to be otherwise eligible for such benefits" (42 U.S.C. 1383(a)(4)(B)). The payment of interim benefits under the district court's order in this case is not based on any comparable prima facie showing of entitlement; to the contrary, all of the members of the class were determined *not* to be disabled. Respondents quote (Resp. Br. 38-39) language from the Senate report on 42 U.S.C. 1383(a)(4) stating that, in order to avoid any disruption in benefits, the Committee "expects that the Secretary will make the initial determination of disability before the end of the 3-month period." S. Rep. 92-1230, *supra*, at 391. This case, however, involves not the initial determination stage of the process mentioned in the Senate report, but reconsiderations and ALJ hearings that are conducted after the State agency has completed the initial determination and found that the claimant is not disabled. Congress included no processing deadlines or interim benefits requirement for reconsiderations and ALJ hearings in disability cases even under the SSI program, let alone under Title II.

c. Respondents also ignore the significance of the special disability amendments passed by Congress in 1982 in

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[5] Congress presumably did not provide a parallel authorization for payments to cover living expenses during the extended time sometimes required for the processing of new applications for disability benefits under Title II of the Act, involved here, because those benefits are not based on need. Congress has, however, provided for the payment of interim benefits through the ALJ stage under Title II for persons who previously had been receiving benefits but whose disability was found by the State agency to have ceased. See pages 5-7, *infra*.

Sections 2 and 4 of Pub. L. No. 97-455, 96 Stat. 2498 and 2499, which they treat as only of marginal relevance. See Resp. Br. 39, 47-48. These amendments are directly relevant, however, because Congress there addressed the very issue of the timing of ALJ hearings and interim benefits that respondents raise in this case. In the 1982 amendments, Congress responded to what it perceived to be the special hardship experienced by one subcategory of disability claimants while their cases are under administrative review—those claimants, like respondents Day and Maurais, who previously were receiving benefits and became dependent upon them but whose benefits were terminated after an initial determination by the State agency that their disability had ceased. But Congress acted not, as respondents urge this Court to do, by requiring that all ALJ hearings be held within a fixed period of time and that all claimants—new applicants as well as prior recipients—receive benefits if the arbitrary deadlines are not met.[6] Congress left the ALJ hearing process undisturbed and chose instead to provide a separate opportunity for a hearing at the earlier reconsideration stage and to authorize payment of interim benefits through the ALJ stage in the narrow category of disability cessation cases, without regard to the amount of time required to hold an ALJ hearing (Gov't Br. 29-30).[7]

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[6] The House report on the bill that formed the basis for the 1982 legislation specifically disapproved of fixed processing deadlines because they might lead to incorrect decisions. H.R. Rep. 97-588, 97th Cong., 2d Sess. 19-20 (1982) (quoted at Gov't Br. 29-30). Contrary to respondents' assertion (Resp. Br. 47 n.50), the House report is directly pertinent to the amendments passed by Congress in Public Law No. 97-455 because it discusses the provisions of a bill (H.R. 6181, 97th Cong., 2d Sess. (1982)) that later were included in Public Law No. 97-455. See H.R. Rep. 97-588, *supra*, at 8-9, 11-15.

[7] As we have explained in our opening brief (Gov't Br. 4 n.3), the temporary interim benefits authorization enacted in Section 2 of Pub. L. 97-455 applies only to disability termination cases in which an initial determination was made prior to October 1, 1983. That authorization was temporarily extended to December 7, 1983 by Section 2 of Pub. L. No. 98-118, 97 Stat. 808. The House Committee on Ways and Means recently reported a bill (H.R. 4170,

Once again, then, Congress demonstrated that when it has perceived a need to alleviate hardship that might be experienced by certain claimants as a result of the passage of time during administrative review of a claim, it has included special remedial provisions in the Social Security Act itself. Congress did not enact any such measures, however, for persons who have filed new applications for benefits and therefore have not yet become dependent upon the receipt of benefits.[8] Respondents therefore plainly err in contending that courts may impose such requirements under the general language in 42 U.S.C. (Supp. V) 405(b).[9]

98th Cong., 1st Sess. (1983)) that would make permanent the statutory authorization for interim benefits through the ALJ stage in disability cessation cases. See H.R. Rep. 98-432, 98th Cong., 1st Sess. 423-424, 1151-1152 (1983). Similar bills have been introduced in the Senate, but no action has yet been taken on them. S. 476, 98th Cong., 1st Sess. (1983); S. 2002, 98th Cong., 1st Sess. (1983). An amendment to extend the interim benefit authorization for an additional six months beyond December 7, 1983 was added as a floor amendment to a tariff bill passed by the Senate on November 18, 1983 (H.R. 3391, 98th Cong., 1st Sess.; 129 Cong. Rec. S16855-S16858 (daily ed. Nov. 18, 1983)), but the House of Representatives failed to consider the bill under a unanimous consent agreement after a Member raised an objection (129 Cong. Rec. H10620-H10621 (daily ed. Nov. 18, 1983)).

[8] Such persons, as respondents concede (Resp. Br. 47 n.49), comprise the vast majority (approximately 92%) of the members of the class in this case.

[9] Respondents contend (Resp. Br. 13-16) that the report prepared by the Social Security Board in 1939 supports the decisions below. See Attorney General's Committee on Administrative Procedure, *Administrative Procedure in Government Agencies*, S. Doc. 10, 77th Cong., 1st Sess., Pt. 3 (1941). As respondents concede (Resp. Br. 15 n.11), however, that report establishes that the Board recognized fairness, uniformity, and accuracy of decisions to be important features of the hearing process under 42 U.S.C. (Supp. V) 405(b). S. Doc. 10, *supra*, at 36-38. The Board's discussion upon which respondents rely shows only that the Board believed that the need for expedition was another aspect of the administrative task. This is entirely consistent with our submission that timing is merely one aspect of the statutorily required "reasonable * * * opportunity for a hearing." In any event, since 42 U.S.C. (Supp. V)

d. Finally, respondents try to explain (Resp. Br. 39-43) Congress's decision not to enact statutory time limits on the numerous occasions in 1975 and thereafter in which it has considered the question (see Gov't Br. 22-31) by referring to statements by HHS officials that they expected eventually to reduce the backlog of ALJ hearing requests and the time taken to process them. As we have shown (Gov't Br. 23-24), however, the background of the 1975 legislation also reflects concern that processing deadlines would adversely affect the quality of adjudication, and subsequent legislative materials have stressed that concern as Congress's reason for declining to impose fixed deadlines, rather than an expectation that the backlog of cases would soon be eliminated (Gov't Br. 26-30).

In any event, whatever Congress might have projected in 1975, it since has become fully aware of the exploding disability caseload and the resulting processing times that have shown the Secretary's earlier optimism to have been misplaced. In its report to Congress on processing times required by the Social Security Disability Amendments of 1980, Pub. L. No. 96-265, 94 Stat. 441 *et seq.*

405(b) was enacted, Congress has separately addressed the question of timing and expedited payment of benefits in other sections of the Act.

As respondents point out (Resp. Br. 15), the Board's 1939 report expresses the expectation that reconsiderations and hearings would be completed within 30 days of a request. S. Doc. 10, *supra*, at 40-41, 45. Respondents do not suggest that, as a result, 42 U.S.C. (Supp. V) 405(b) itself requires that these steps be completed within 30 days. Such a suggestion would be untenable. The Social Security program is vastly more complex today than it was in 1939. In 1939, the Board predicted an annual hearing caseload of between 5,000 and 20,000 cases, as contrasted to the 362,000 hearing requests in fiscal year 1983. S. Doc. 10, *supra*, at 37. Moreover, although the questions that arose under the old age and survivors program in 1939 typically involved rather straight-forward disputes over the claimant's age, relationship, or earnings records, the overwhelming number of ALJ hearings now are requested in disability cases, which involve far more difficult medical and vocational judgments. Book Review, *Bureaucratic Vision*, 96 Harv. L. Rev. 1952, 1956 n.21 (1983).

HHS proposed much longer time frames than the 90-day limits previously discussed in 1975 and stressed that it could not be sure that even those longer deadlines would be met, in view of budget and staff limitations, projected workload increases, the impact of additional procedural measures mandated by the Disability Amendments of 1980, and the circumstances of individual cases, such as the need to obtain sufficient medical documentation (see Gov't Br. 28 n.34). And soon thereafter, in connection with the litigation on remand from the Sixth Circuit's decision in *Blankenship* v. *Secretary of HEW*, 587 F.2d 329 (1978), the Secretary on November 30, 1981 publicly disavowed the workability of processing deadlines.[10] Con-

[10] Respondents argue (Resp. Br. 22, 31, 33-35) that the courts below were justified in imposing fixed deadlines because the Secretary stated in the past that time limitations represent an appropriate solution to the problem of unreasonable delay. This assertion is misleading. Respondents note that in 1978 there was a goal in Vermont of scheduling ALJ hearings within 90 days (J.A. 50). But the fact that HHS established an internal goal against which to measure its performance does not lend support to a court's imposing mandatory hearing deadlines. Respondents also note that the Secretary proposed regulations in 1980 requiring hearings to be scheduled within 90 days (45 Fed. Reg. 12937). As respondents concede (Resp. Br. 34 n.38), however, the proposed regulations they cite resulted in large part from the remand in *Blankenship* to permit the Secretary to develop regulations as an alternative to the court's imposing its own deadlines (see 45 Fed. Reg. 12837 (1980). In *Blankenship*, of course, the Secretary contended that the processing times then being experienced by claimants were *not* unreasonable and that no remedy, including the promulgation of regulations, was necessary. Respondents also fail to note that the Secretary's proposed regulations contained exceptions from the hearing deadlines not only for situations in which the *claimant* caused a delay, as in the district court's order in this case, but also where the *ALJ* determined that additional evidence was needed or where uncontrollable circumstances were present. 45 Fed. Reg. 12839 (1980). The courts below allowed no such flexibility in this case. See pages 14-15, *infra*. In any event, the Secretary subsequently repudiated support for the concept of fixed processing deadlines of the type involved in *Blankenship*, whether in regulations or court orders.

Finally, respondents refer (Resp. Br. 34-35) to a 60-day time limit contained in regulations proposed by the Secretary to imple-

gress's decision not to adopt fixed deadlines therefore cannot be attributed to a supposed belief that the Secretary would do so administratively or that the hearing backlog was about to evaporate. But even if respondents' unsupported assertion that Congress declined to act for these reasons were correct, that would hardly justify the imposition of processing deadlines by the courts.

2.a. In an effort to avoid the force of the overwhelming indicia of congressional intent not to impose fixed deadlines on the administration of the disability program, respondents assert (Resp. Br. 19-30, 48) that the judgment below nevertheless is warranted by "fact-specific" circumstances in Vermont. This assertion is plainly wrong. The Secretary has been directed by Congress "to assure effective and uniform administration of the disability insurance program throughout the United States." 42 U.S.C. (Supp. V) 421(a)(2). The validity of the manner in which the disability program is administered therefore cannot be measured on a State-by-State basis by particularized fact-finding and ad hoc balancing of factors—*e.g.*, available resources, logistical difficulties, claimant hardship, and the reasons for the time taken to review claims—pertaining to each State in isolation. Cf. *EEOC* v. *Wyoming*, No. 81-554 (Mar. 2, 1983), slip op. 13. This is especially so with respect to ALJ hearings, in which the States play no role.

The Act does provide for the States to make prehearing determinations of disability, subject to review by the Secretary. 42 U.S.C. (Supp. V) 421(a) and (c). The Act also authorizes the Secretary to promulgate

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ment the statutory requirement passed by Congress in 1982 that claimants be afforded an evidentiary hearing at the reconsideration stage in disability cessation cases. 48 Fed. Reg. 36836 (1983); see note 6, *supra*. These proposed regulations do not, however, contain a deadline within which the hearing must be held, as the district court ordered in this case. The 60-day time frame is for rendering a decision *after* the hearing has been held or after the record has been closed if additional evidence is submitted following the hearing. These proposed regulations therefore lend no support to respondents' position.

criteria by which to evaluate a State's performance. The Secretary has discretion to include time limitations in these criteria (42 U.S.C. (Supp. V) 421(a)(2)(C)), although she has not done so for the reconsideration stage (Gov't Br. 45).[11] Since Congress has expressly addressed the question of timing of State disability determinations in 42 U.S.C. (Supp V) 421(a), respondents err in defending court-imposed time limits on reconsiderations by the State of Vermont in reliance on the language of 42 U.S.C. (Supp. V) 405(b) providing for a "reasonable * * * opportunity for a hearing," which does *not* mention reconsiderations, State agencies, or the matter of timing.

b. Although the text of the Act does not support their State-by-State approach, respondents contend (Resp. Br. 39) that Congress's failure to amend the language of 42 U.S.C. (Supp. V) 405(b) to bar the imposition of fixed deadlines after courts had imposed deadlines in certain States indicates that Congress approved of those judicial decisions. Respondents cite nothing in the legislative history to support this assertion, and we are not aware of any support. In fact, the legislative record discussed in Point 1 and in our opening brief (Gov't Br. 23-30) dem-

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[11] Respondents' reliance on *California Department of Human Resources Development* v. *Java*, 402 U.S. 121 (1971), and *Fusari* v. *Steinberg*, 419 U.S. 379 (1975), is misplaced. Those cases concern the timing of payments of unemployment benefits under Title III of the Act. Title III, in contrast to 42 U.S.C. (Supp. V) 405(b), does explicitly address the matter of timing of state decisions by requiring that payments be made "when due." 42 U.S.C. 503(a)(1). Moreover, in *Java*, the Court held that postponement of payment to a claimant who had been found *eligible* for benefits pending the employer's appeal of that decision violated the statute. 402 U.S. at 123, 133. In this case, payment has been withheld because the claimants have been found *not* to be eligible. In *Fusari*, the Court declined to decide the validity of Connecticut procedures under the "when due" requirement because of intervening changes in state law. 419 U.S. at 386-390. We note as well that particular focus on the States' administration was necessary in *Java* and *Fusari* because the unemployment program is entirely administered by the states. The disability program, by contrast, has significant federal involvement at all levels and the ALJ hearing system is entirely federally administered.

onstrates a clear rejection of such deadlines. Reports issued by the staff of the House Committee on Ways and Means in 1981, for example, note the "disruption" caused by the "plethora" of judicial orders imposing time limits, because resources must be shifted from one district to another;[12] explain that the Committee had resisted efforts to put time limits in the Act because of the potential effect on the quality of decisionmaking; and confirm that the provision in the 1980 Disability Amendments for the Secretary to submit a report to assist Congress in studying the matter was "'[i]n lieu of putting such statutory requirements'" in the 1980 Amendments (Gov't Br. 30-31 n.36 (citation omitted)).

c. Not only is there no legal basis for respondents' attempt to support the judgment below by focusing only on the State of Vermont; there is no factual basis for this approach either. The district court's holding that the timing of ALJ hearings in Vermont was not reasonable did not depend on a "fact-specific" balancing of relevant factors in Vermont. The district court relied

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[12] In an attempt to defend the judgment below, respondents rely (Resp. Br. 8 n.6, 26-27 & n.27, 30 n.32) on the fact that the Secretary has been able to comply with the 90-day time limit for holding ALJ hearings in Vermont without transferring ALJs into the state or transferring cases out of the State. Vermont is a small and, in many ways, atypical State; unfortunately, HHS's experience has been different elsewhere. As we have explained in the certiorari petition (Pet. 16 n.17), in order to comply with judicially imposed deadlines in New York in 1980 and 1981, it was necessary to transfer 6,400 cases for decision by ALJs outside the State, and in order to comply with a similar decree in Massachusetts, it was necessary to transfer all new cases while ALJs in the State reduced the then-pending backlog. See also Gov't Br. 30-31 n.36. Such reallocations of resources, which could only be expected to increase if judicially imposed time limits spread to other States, are disruptive and operate to the disadvantage of claimants in other jurisdictions. In addition, as we also have explained in the certiorari petition (Pet. 17), there is substantial variation among the decrees that already have been entered in a number of States, thereby producing disparity even as among the claimants sought to be benefited and creating complex administrative burdens for HHS in seeking to comply with the decrees.

solely on the fact that 43% of the Vermont claimants did not receive a hearing within 90 days. See Pet. App. 17a. The court did not make any further findings of fact with respect to *why* more than 90 days had elapsed in these individual cases, much less determine that the passage of time was not due to reasonable administrative steps in preparing for and scheduling the hearings within the limits of existing priorities, procedures, and resources. Respondents in fact concede (Resp. Br. 8) that the reasons why hearings were not held within 90 days were "unexplained." Respondents likewise cite no facts pertaining to the ALJ hearings generally to support the imposition of such deadlines.[13]

The district court did inquire to a limited extent into the timing of reconsiderations in Vermont, but its analysis was wholly inadequate to sustain the imposition of fixed deadlines even if a State-by-State assessment of the matter were appropriate. The district court relied almost entirely on logs identifying the date on which various steps occurred in each of a sample of 77 reconsideration cases in Vermont. The court found that in 27 of these 77 cases, the decision was rendered more than 90 days after the request for reconsideration, and the court held that these processing times were unlawful because the reasons for them were "unexplained" (Pet. App. 28a). However, a finding that an agency's reasons are "unexplained" does not mean that they are improper. *INS* v. *Miranda*, No. 82-29 (Nov. 8, 1982).[14]

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[13] Respondents repeatedly rely on the fact (Resp. Br. 4, 7, 22, 26) that some delay was occasioned in holding respondent Day's hearing because an SSA employee neglected to initiate the hearing process after receiving a letter from counsel for Day, pending receipt of the appropriate SSA form signed by Day (J.A. 47-48, 57). But this single error—the effects of which would have been mitigated if counsel had not waited almost two months to return the signed form (J.A. 57)—scarcely justifies judicial time limits on all ALJ hearings in Vermont.

[14] In fact, the processing times were not wholly "unexplained." Respondent Day's own case was selected as a quality assurance sample case by SSA in Baltimore and was returned to the Vermont

Moreover, the district court did not dispute the Secretary's assertion that much time often is consumed in the reconsideration process because, *e.g.*, the case file must be located by SSA and sent to the State agency, the State agency often has difficulty in obtaining needed evidence from third parties (such as the claimant's physician), SSA conducts a review of many State decisions before they become final, and limitations in SSA's computerized records system often require additional steps (Pet. App. 28a). The court's only response to the Secretary's concerns was that claimants should not "have to endure delays caused by inefficient agency procedures or unnecessarily lengthy internal quality control checks" (*ibid.*). Congress, however, has vested the Secretary with responsibility for adopting procedures to administer the disability program (42 U.S.C. (& Supp. V) 405(a) and 421(a)) and indeed has required that SSA conduct a quality review of State decisions (42 U.S.C. (Supp. V) 421(c)). A court may not disregard Congress's and the Secretary's considered judgments in this regard—or hold

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agency in order for a neurological consultative examination to be conducted. The various steps in this process—selecting and reviewing the case in Baltimore, sending it to Vermont, scheduling the examination, reviewing the results of the examination, and returning it to Baltimore—account for more than half of the total time (167 days) consumed between Day's request for reconsideration and the decision on reconsideration. Such a quality review is expressly authorized by Congress (42 U.S.C. (Supp. V) 421(c)), and it served the interests of Day as well as the government because he might have been found disabled on the basis of the consultative examination without the need for an ALJ hearing. Similar quality reviews (by SSA or the state agency) were conducted in a number of the 27 sample cases in which more than 90 days elapsed before the reconsideration decision (J.A. 108 (#3), 129 (#45), 133 (#51, #58), 148-149 (#77), 148 (#76)). In others of the 27 cases, delay was occasioned by such factors as unsuccessful attempts to contact the claimant (J.A. 124, 194 (#33), 138 (#57), 137 (#60)), loss of forms by the claimant's attorney (J.A. 125-126 (#36)), the claimant's refusal to cooperate (J.A. 147 (#75)), and failure by the treating physician to respond to requests for information (J.A. 129 (#45), 132 (#49), 135 (#53), 137 (#56)). These delays cannot be attributed to SSA or the State agency.

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unlawful the time ordinarily taken to complete the procedures they have devised—on the basis of its own view that certain steps in the process are "unnecessary" or "inefficient" or by its own post hoc determination that, in isolated cases, those steps might have been completed more quickly.

d. Respondents also argue (Resp. Br. 8-9, 31-32) that the 90-day deadlines imposed by the courts below in Vermont are flexible and accommodating of the Secretary's interests. They are not. The only exceptions from their mandatory terms are for situations in which the *claimant* submits new evidence or requests or causes delay. Under the court's order, a State agency may not postpone a decision on reconsideration past the 90-day deadline on the basis of its own determination that the claimant should undergo a consultative examination unless the claimant agrees to the examination, even though the regulations provide that the State agency has the authority to obtain additional evidence or to order a consultative examination (Pet. App. 30a, 33a). 20 C.F.R. 404.1502, 404.1503, 404.1527. See *Richardson* v. *Perales*, 402 U.S. 389, 393-394 (1971); *Mathews* v. *Eldridge*, 424 U.S. 319, 338 n.20 (1976).

Similarly, the ALJ hearing date may not be continued beyond the 90-day deadline even where the ALJ believes it is necessary to gather additional medical evidence (Pet. App. 34a), despite the fact that governing regulations and procedures require the ALJ to look fully into the issues and authorize him to gather new evidence or order a consultative examination prior to the hearing (Gov't Br. 9). It is true that under the district court's order, the ALJ is free to seek such additional evidence *after* the hearing (Resp. Br. 32). But it is not for the district court to dictate to an ALJ whether he will seek necessary evidence before or after a hearing. If the ALJ gathers all evidence in advance, it may turn out that the claimant will be found eligible for benefits without the need for a hearing (see J.A. 52). Even if that does not occur, full development of the case by the ALJ and his

staff prior to the hearing at least will serve to focus the issues and lead to more efficient and fair adjudications. Thus, just as a district court would not ordinarily schedule a case for trial before discovery has been completed, the Secretary's procedures permit an ALJ to complete necessary discovery prior to the hearing.[15]

3. Respondents' assertedly fact-bound submission also overlooks the fact that because Congress has conferred on the Secretary the responsibility for adopting rules and procedures for the adjudication of claims (42 U.S.C. (& Supp. V) 405(a) and 421(a); *Heckler* v. *Campbell*, No. 81-1983 (May 16, 1983), slip op. 7-8)), it is for the Secretary, not the courts, to give content in the first instance to the statutory phrase "reasonable * * * opportunity for a hearing." The validity of the overall manner in which the Secretary has accommodated the numerous and often competing statutory goals in implementing the hearing requirement does not turn on whether a court would take the same approach; whether the resulting administrative process, including the time typically required to adjudicate claims under it, satisfies a court's own view of what is most "reasonable"; or whether the Secretary

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[15] Respondents appear to suggest (Resp. Br. 25-26 n.25) that the provisions of the *OHA Handbook* providing for a prehearing workup and for the scheduling of the hearing after that workup is completed may violate 42 U.S.C. (Supp. V) 405(b) if those measures "prevent[] fulfillment of the need for expedition" (Resp. Br. 26 n.25). However, 42 U.S.C. (Supp. V) 405(b) simply provides for a "reasonable * * * opportunity for a hearing," of which timing is but one element. Surely, it is a "reasonable" feature of an adjudicatory process to complete discovery and other preparation prior to the hearing, even if the date of the hearing itself may sometimes be postponed as a result. This is consistent with the Social Security Board's understanding soon after 42 U.S.C. (Supp. V) 405(b) was enacted in 1939. The Board explained that "[t]here is * * * no requirement in the act that a hearing be accorded to a claimant * * * immediately upon his request. Reasonable preliminaries may be imposed. If the Board sees fit, it can require a consultation between the claimant and a representative of the Board prior to the hearing, for the purpose of clarifying the issues." S. Doc. 10, *supra* note 9, at 39. See also *id.* at 42.

is able to convince a court of the soundness of each step in the processing of each individual claim. The question, rather, is whether the Secretary's rules and procedures are arbitrary and capricious. *Heckler* v. *Campbell*, slip op. 7-8; *Schweiker* v. *Gray Panthers*, 453 U.S. 34, 43-44 (1981); *Batterton* v. *Francis*, 432 U.S. 416, 424-426 (1977). Judicial deference to the manner in which the Secretary has implemented the statutory hearing requirement is particularly warranted in the present context, because the availability of resources has a substantial impact on the speed with which claims are decided, and because Congress itself determines each year the amount of money that should be made available from the Trust Funds for the administration of the disability program. 42 U.S.C. (Supp. V) 401(g)(1)(A) and 421(e).

This conclusion is reinforced by a consideration of the relative expertise of Congress and the Secretary on the one hand and the courts on the other to address the overall institutional problems presented in administering the vast Social Security disability program. Reducing the average time taken to adjudicate claims while maintaining or improving other aspects of the adjudicatory process presents complex questions of policy, resource allocation, management, relative equities of claimants, and the feasibility and desirability of revising various interrelated procedures. These matters are uniquely within the competence of Congress and the Secretary to resolve,[16] and in fact Congress amended the Act in 1980 to strengthen the Secretary's oversight of the States' administration of the Act, including questions of timing. 42 U.S.C. (& Supp. V) 421. See Gov't Br. 44-45. The courts, in contrast, generally are not well suited to address such questions of administrative efficiency on a mass scale, especially with nothing more to guide them

[16] The affidavit and reports of the Vermont DDA director and HHS officials regarding the administration of the disability program in Vermont (J.A. 161-191), upon which respondents rely (Resp. Br. 25 & n.24), demonstrate that these officials take their management and oversight responsibilities seriously.

than statutory language as vague as that in 42 U.S.C. (Supp. V) 405(b) providing for a "reasonable * * * opportunity for a hearing."[17] This has been the view of commentators who have studied the Social Security disability program.[18]

4. We have sufficiently answered in our opening brief respondents' contention (Resp. Br. 43-50) that the courts below properly ordered the payment of interim benefits to claimants whose cases are not decided within the judicially prescribed time limits. See Gov't Br. 46-49. When Congress has wished to depart from the general rule that disability benefits may be paid only upon a final decision that the claimant is disabled (42 U.S.C. (& Supp. V) 405(i) and 423(a)(1)), it has expressly so provided in the Act itself. Congress did so in 42 U.S.C. 405(q), which excludes disability claims altogether from its authorization of expedited benefits, and then in 1982 in Public Law No. 97-455, which provides for interim benefits pending an ALJ decision only in disability *cessation* cases. Contrary to respondents' contentions (Resp. Br. 46-48, 49), Congress's explicit provision for interim benefits pending administrative review in certain circumstances under Title II forecloses an award by the courts

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[17] See Goldman, *Administrative Delay and Judicial Relief*, 66 Mich. L. Rev. 1423, 1430 (1968). As explained by Professor Goldman, this is so for several reasons: (1) "the large number of potentially relevant factors and the difficulty of assessing the relative importance of each variable" (66 Mich. L. Rev. at 1429); (2) the likelihood of constant "relitigation of the same issue under changing circumstances," thereby consuming scarce judicial time (*id.* at 1430); (3) the "difficulty of acquiring enough evidence," given the limited factfinding resources of the judiciary (*ibid.*); and (4) the "serious question" about "the courts' ability to fashion an appropriate remedy" for administrative inefficiency (*ibid.*). In short, "[i]f delay results from inadequate appropriations, lack of personnel, or incompetence, the remedy seems to be with the legislature and not with the courts" (*ibid.*).

[18] See J. Mashaw, *Bureaucratic Justice* 185-190, 226 (1983); Book Review, *Bureaucratic Vision*, 96 Harv. L. Rev. 1952, 1958-1962 (1983); Note, *Judicial Resolution of Systemic Delays in Social Security Hearings*, 79 Colum. L. Rev. 959, 968-982 (1979).

in circumstances where Congress has refused to authorize interim benefits.

Respondents attempt to avoid this result by contending (Resp. Br. 43 n.46, 45 n.47, 48) that the payments involved are not really disability benefits, but rather are simply relief payments intended to compensate persons whose claims are not considered within the judicially imposed time limits and to secure compliance with those time limits. Respondents' assertion is somewhat disingenuous. The district court explicitly stated in its judgment that the payments it ordered were "interim Title II disability insurance payments to Title II disability claimants" (Pet. App. 34a) and termed the payments "benefits" (*id.* at 35a). But even if respondents' characterization were correct, the substantive limitations Congress placed on the payment of benefits cannot be avoided simply by use of labels or by incorporating the monetary relief in an equitable decree. See *Schweiker* v. *Hansen*, 450 U.S. 785, 788 (1981).[19]

In any event, the award of interim benefits is barred under the doctrine of sovereign immunity because Congress concededly has not affirmatively authorized such payments from the federal Treasury. U.S. Const. Art. I, § 9, Cl. 7 ("No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law"). Respondents argue (Resp. Br. 48-49), however, that the fiscal consequences of compliance with a prospec-

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[19] Even where monetary relief is appropriate to enforce a decree, the plaintiff must prove his substantive entitlement in order to obtain compensation. *United States* v. *United Mine Workers*, 330 U.S. 258, 303-304 (1947). The courts in *Rodriguez* v. *Swank*, 496 F.2d 1110, 1111 (7th Cir.), cert. denied, 419 U.S. 885 (1974), and *Alexander* v. *Hill*, 707 F.2d 780, 782-783 (4th Cir. 1983), petition for cert. pending, No. 83-163, relied upon by respondents (Resp. Br. 45 n.47), awarded monetary relief only to persons found eligible for benefits. The interim benefits involved here are not based on a finding of disability. In *Smith* v. *Miller*, 665 F.2d 172, 174 (7th Cir. 1981), also cited by respondents (Resp. Br. 45 n.47), the federal program manual required participating states to provide that applications would be automatically approved if not acted upon within a specified period.

tive injunctive decree entered against a federal official are merely an "ancillary" and "inevitable" effect of the decree and therefore are permissible under the doctrine of sovereign immunity. This transparent attempt to avoid the bar of sovereign immunity should not be countenanced.

The courts below did not find, and respondents do not contend, that the Social Security Act itself requires the payment of interim benefits where the Secretary does not conduct a hearing within a fixed or "reasonable" period of time. As respondents concede (Resp. Br. 45, 48-49), the interim payment relief was fashioned entirely by the court, assertedly under its "equitable" powers, without regard to the terms of the Social Security Act. Thus, respondents do not seek the future payment of interim benefits pursuant to the Social Security Act, such that a judicial order requiring the Secretary to comply with the Act in the future carries with it the incidental, inevitable consequence of requiring the payment of benefits if the deadlines are not met. Rather, respondents in effect ask this Court to recognize an implied right of action under the Social Security Act for money damages to be paid out of the Treasury as a remedy when the Secretary has violated the Act's hearing requirement. Compare *Carey* v. *Piphus*, 435 U.S. 247 (1978). As this Court has made clear, an award of money damages against the government as a remedy for violation of a statute is barred by sovereign immunity unless Congress has affirmatively waived that immunity. *United States* v. *Mitchell*, No. 81-1748 (June 27, 1983), slip op. 6; *United States* v. *Testan*, 424 U.S. 392, 399-403 (1976). Congress has not done so here.

For the foregoing reasons and the additional reasons stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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